STATE OF MINNESOTA

IN SUPREME COURT

A20-1097

Court of Appeals — Anderson, J.

State of Minnesota,

Respondent,

vs.

Filed: June 15, 2022
Office of Appellate Courts

Deangelo Shaheed Bey,

Appellant.

Keith M. Ellison, Attorney General, Saint Paul, Minnesota, and

Janelle Kendall, Stearns County Attorney, River D. Thelen, Assistant County Attorney, Saint Cloud, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

1. The omission of a single juror's response to jury polling in the trial transcript does not establish a violation of appellant's constitutional right to a unanimous, 12-member jury so long as the record sufficiently demonstrates the existence of other safeguards ensuring that the jury was properly impaneled and returned a unanimous verdict free of coercion or pressure, as is the case here.

2. Appellant is not entitled to relief based on a jury polling error because he did not object during trial, it was not a structural error, and he has not satisfied the plain error doctrine.

Affirmed.

O P I N I O N

ANDERSON, Justice.

In February 2020, a jury found appellant Deangelo Shaheed Bey guilty of two counts of first-degree burglary and two counts of second-degree assault. After the jury announced its verdicts, Bey exercised his right to poll the jury. Despite several facts in the record tending to show that the jury was composed of the constitutionally required 12 members, and that those members returned unanimous verdicts, the transcript of the jury polling contains only 11 responses. The 11 responses were unanimously "guilty." No person present—the district court judge, the judge's clerk, the court reporter, the jury attendants, the attorneys, the jurors, or Bey himself—raised any objections at the time. Bey argues for the first time on appeal that, because the record contains only 11 individual responses to jury polling, it is insufficient to prove that he was afforded his constitutional right to a unanimous, 12-person jury. The State argues that the record adequately supports the verdict and that jury polling is merely one mechanism to ensure a unanimous, 12-person jury. We hold that because sufficient evidentiary support in the record demonstrates that Bey was found guilty by a unanimous, 12-member jury, Bey has not established a violation of his constitutional right to a unanimous, 12-member jury. We further hold that Bey is not entitled to relief for any error in the jury polling because he did not object before the

district court, it was not a structural error, and he has not satisfied the plain error doctrine. Consequently, we affirm the decision of the court of appeals.

FACTS

Bey married J.B., and the couple had four children. By September 2019, the children varied in age from 2 to 12 and Bey and J.B. had informally separated. On September 4, 2019, J.B. and the children were staying in the apartment of J.B.'s boyfriend, S.S. Around midnight, S.S. opened the door after a woman knocked and claimed to be a neighbor in need of assistance. As soon as the door opened, several people—including Bey—rushed in. Bey struck S.S. with the butt of a handgun. J.B. testified that Bey pointed the gun at her and said, "Kids, let's go," and "don't make me do this." J.B. was carrying one of her children until another assailant struck J.B. with a taser and took the child from her arms. Bey and the other assailants then left with the four children, and J.B. called 911.

The State charged Bey with two counts of first-degree burglary, Minn. Stat. § 609.582, subd. 1(b)–(c) (2020), and two counts of second-degree assault, Minn. Stat. § 609.222, subd. 1 (2020). At Bey's 3-day trial, the evidence against Bey included testimony from J.B., S.S., one of S.S.'s roommates, and one of the children. The State presented photographs of S.S.'s injuries, taken by police the night of the incident. The State also presented security footage from the apartment building that showed Bey hiding out of view of S.S.'s door with four other individuals, rushing into S.S.'s apartment when the door was opened, and then leaving with the children. The video showed Bey holding an object that both J.B. and S.S. identified as a handgun. One of the children also testified that Bey was armed.

Bey testified in his own defense. He claimed that he had not been violent, that he was entitled to custody of the children, and that J.B. was at fault for wrongfully failing to return the children. He testified that the item he held, which was seen in the surveillance video, was either a toy gun belonging to one of the children or his daughter's cell phone. The State did not find or present the alleged gun and witness descriptions of the gun were not entirely consistent. S.S. described the gun as black with a silver barrel. J.B. described the gun as black. J.B.'s 11-year-old daughter initially testified that the events were too difficult to talk about, but she was eventually able to state that Bey was holding a gun, which she described as gray. Bey claimed that his daughter testified for the prosecution only because "somebody turned [his] daughters against [him]."

The district court initially seated 14 jurors—12 members and 2 alternates. During the second day of trial, one of the jurors was dismissed because he knew a witness. After closing arguments, the court dismissed the other alternate juror, stating that "the law dictates how many jurors can deliberate, so unfortunately I have to excuse you from deliberation." The court verbally instructed the remaining jurors that, "for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous." The court also provided written jury instructions, which again stated that "each juror must agree with that verdict. Your verdict must be unanimous."

Immediately after final jury instructions, the district court swore in jury attendants. The jury followed these attendants to the jury room to deliberate. Later that same day, the jury returned guilty verdicts on all counts. The clerk read the verdicts aloud. The court

asked the jury as a group whether "this is your verdict so say you all?" The jury responded as a group, "Yes," and no juror objected.

Bey requested that the district court poll the jury under Minnesota Rule of Criminal Procedure 26.03, subd. 20(5).[1] The clerk asked the jurors individually by name whether they supported the verdicts. The transcript records the clerk questioning 11 jurors, all of whom responded in the affirmative. The court then stated, "I think that's everyone." No objections were made to either the polling process or the court's conclusion that "everyone" had been polled.

Bey appealed, arguing that his right to a unanimous jury of 12 members was violated because only 11 jurors found him guilty of the charged offenses. In a nonprecedential opinion, the court of appeals noted that the record strongly implied that 12 jurors were present when the verdicts were announced, even if the record showed only 11 responses during the jury polling. *State v. Bey*, No. A20-1097, 2021 WL 2794672, at *2 (Minn. App. July 6, 2021). The court held that the missing response was because "the transcript does not accurately reflect what occurred in the courtroom." *Id.* The court therefore held that Bey failed to show that he was found guilty by fewer than 12 jurors and affirmed Bey's convictions. *Id.* at *2–3. We granted review.

[1] When a jury agrees on a verdict, the foreperson returns that verdict to the court on behalf of the entire jury. Jury polling is then a process of asking each juror on the record whether he or she agrees with the verdict. Minn. R. Crim. P. 26.03, subd. 20(5).

ANALYSIS

We review questions of constitutional law de novo. *State v. Grigsby*, 818 N.W.2d 511, 517 (Minn. 2012). Likewise, we review the interpretation of the rules of criminal procedure de novo. *State v. Nerz*, 587 N.W.2d 23, 24–25 (Minn. 1998).

It is undisputed that the record in Bey's case reflects an irregularity: felony juries must have 12 members, but the transcript of the jury poll in Bey's trial record reflects responses from only 11 members of the jury. We must first determine the significance of this inconsistency. Bey argues that he was denied his constitutional right to a unanimous jury of 12 members because the district court may never assume facts not in the record. The State argues that there is sufficient evidence in the record to establish that a 12-member jury returned a unanimous verdict and that, at most, Bey has demonstrated an error with the jury polling process. It is also undisputed that Bey never objected at trial that the jury was less than 12 members and that he raised the claimed error for the first time on appeal. We first consider the scope of the potential error—whether Bey has in fact raised a claim that his constitutional right to a unanimous verdict was violated, or whether any error is limited to the failure to properly poll the jury. After resolving that question, we turn to whether Bey is entitled to any relief for the irregularity in the record.

I.

Defendants charged with felony offenses have a right to a trial by a jury of 12 members. Minn. Const., art. I, § 6. Under the Fourteenth Amendment to the United States Constitution, jury verdicts in felony criminal trials must be unanimous. *Ramos v. Louisiana*, ___ U.S. ___, 140 S. Ct. 1390, 1395 (2020). To protect these rights, defendants

have the procedural right to poll each juror after the verdict is announced. Minn. R. Crim. P. 26.03, subd. 20(5). Polling is optional, but the district court must poll the jury after a party has requested it. *Id*. The purposes of polling the jury are to ensure that the verdict is unanimous and to give jurors an opportunity to object if they disagree. *Hoffman v. City of St. Paul*, 245 N.W. 373, 375 (Minn. 1932); *State v. Plantin*, 682 N.W.2d 653, 662 (Minn. App. 2004).

The dispute here concerns the role of the jury polling process. If polling all 12 members of the jury is necessary to ensure that a defendant's right to a unanimous verdict by a 12-member jury is respected, then Bey's jury trial rights were categorically violated by the failure to properly poll the jury. On the other hand, if polling the jury is simply one mechanism to ensure that Bey's rights were respected, then an error in the jury polling does not give rise to a violation of the constitutional right to a unanimous jury so long as the record contains other evidence sufficient to establish that the verdicts returned by the jury were proper. This is an issue of first impression.

A.

Few other courts have considered the effect of an error during jury polling. Only one court has agreed with Bey's arguments. The Illinois Appellate Court recently considered the issue in *People v. Jackson*, 170 N.E.3d 1075 (Ill. App. Ct. 2021), *appeal allowed*, 175 N.E.3d 71 (Ill. 2021). There, although all 12 jurors individually signed the verdict form, only 11 jurors responded individually to the jury poll. *Id*. at 1078. Over a strong dissent, the court held that this error required reversal as it "challenge[d] the integrity of the judicial process." *Id*. at 1086. According to the court, "jury polling is not only *a*

procedural device designed to ensure the unanimity of the jury's verdict; it is *the* procedural device for accomplishing that goal." *Id*. at 1083. The court held that no other procedural device accomplished the aims of jury polling—namely, no other procedure gave the jurors an opportunity to state individually any reservations that he or she may have had during group deliberations. *Id*.

However, *Jackson* directly conflicts with two earlier decisions of the Illinois Appellate Court: *People v. Sharp*, 26 N.E.3d 460 (Ill. App. Ct. 2015), *abrogated on other grounds by People v. Veach*, 89 N.E.3d 366, 376 (Ill. 2017), and *People v. McGhee*, 964 N.E.2d 715 (Ill. App. Ct. 2012). Both *Sharp* and *McGhee* involved failures to properly poll the jury, and both held that this failure did not implicate the defendant's right to a unanimous verdict. *Sharp*, 26 N.E.3d at 482; *McGhee*, 964 N.E.2d at 723. Indeed, *McGhee* explicitly held that "the requirement that the trial court poll the jury upon request is a common-law rule that is designed to help ensure that the jury's verdict is unanimous, but it is not the sole means of ensuring a unanimous verdict." 964 N.E.2d at 723. And just 5 months after *Jackson*, a different panel of the Illinois Appellate Court disagreed with the *Jackson* panel's holding and instead concluded that "[a] jury poll is not a necessary element of any trial; it is available upon the defendant's request as a means by which the defendant can test the unanimity of the verdict to protect that fundamental right." *People v. Flores*, No. 1-19-2219, 2021 WL 4891579, at *2–3 (Ill. App. Ct. Sept. 30, 2021).

Every other court to consider the issue agrees with the reasoning of *Sharp*, *McGhee*, and *Flores*. The Supreme Court of Arizona considered this issue in *State v. Diaz* and held that the "reporter's transcript reflecting that only eleven jurors were polled following return

of the verdicts," on its own, "failed to establish any error, fundamental or otherwise, relating to the number of jurors who determined his guilt." 224 P.3d 174, 175, 178 (Ariz. 2010). In *Diaz*, the record reflected the views of only 11 jurors but contained other indicia that 12 jurors participated—the district court stated that "[a]ll 12 of [the jurors] must agree on a verdict," sufficient jurors were empaneled, and no party objected. *Id.* at 175 (internal quotations omitted). The Minnesota Court of Appeals, in turn, followed *Diaz* in *State v. Mohamud*, No. A09-0843, 2010 WL 1963434 (Minn. App. May 18, 2010), *rev. denied* (Minn. Aug. 10, 2010), another case in which, although the record reflected only 11 jurors' views, it contained other indicia that 12 jurors participated.[2] *Mohamud* concluded that, "as in *Diaz*, it is not reasonable that the judge, all of the lawyers, the court reporter, the judicial clerks, the other jurors and deputy sheriffs present in the courtroom would fail to realize the jury was only comprised of 11 people" and found that the jury instructions and remaining record were sufficient to prove a proper and unanimous jury verdict. *Mohamud*, 2010 WL 1963434, at *4–5 (citing *Diaz*, 224 P.3d at 177–78).

We agree with the weight of authority and conclude that jury polling is but one mechanism to ensure a unanimous jury verdict, such that an error in polling the jury does not categorically create a violation of the constitutional right to a unanimous jury. The right to poll the jury is not found in either our state or federal constitutions. Instead, it originated as a common law procedure to protect the constitutional rights of jury size and

[2] The court of appeals here relied on *Mohamud* in concluding that "the omission of one juror from the transcript of the jury polling does not establish a constitutional violation." *Bey*, 2021 WL 2794672, at *1–2 (citing *Mohamud*, 2010 WL 1963434, at *4).

unanimity. Indeed, jury polling is optional, to be done at the request of a party or the presiding judge. Minn. R. Crim. P. 26.03, subd. 20(5)(a). In many trials the jury is never polled; thus, it cannot be that polling is the only way to prove a proper jury verdict. An error in jury polling does not violate the constitutional right to a unanimous jury when the record sufficiently demonstrates the existence of other safeguards ensuring that the jury was properly impaneled and returned a unanimous verdict free of coercion or pressure.

B.

Here, jury polling did not serve as the only safeguard of Bey's right to a unanimous jury verdict. Instead, the record in this case amply demonstrates other safeguards that the jury was properly impaneled and returned a unanimous verdict. As to the number of jurors, 14 jurors were originally seated and one was dismissed during the trial. The district court explicitly commented on the proper number of jury members by dismissing the one remaining alternate. The jury then left the courtroom, accompanied by sworn jury attendants, to deliberate. It returned verdicts shortly thereafter. The jury was neither dismissed in the interim nor adjourned overnight, nor were there any other opportunities for jurors to leave. No one present—the judge, the jury attendants, the attorneys, Bey, the judge's clerk, the court reporter, or the other jurors—commented on a missing or overlooked juror. It is not reasonable to presume that one of the jurors simply vanished without anyone noticing.

As to unanimity, the jury was instructed on at least two separate occasions that any verdict must be unanimous. We presume that a jury follows the instructions it is given, *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 630 (Minn. 2012), and Bey has

presented no evidence to suggest otherwise. The jurors were further asked as a group whether the verdicts were unanimous, the jurors agreed as a group, and no juror voiced disagreement. Nor was it the case that any juror affirmatively refused to endorse the verdicts. Because the record includes substantial evidence that the jury was properly constituted and acted unanimously, and because there is no evidence that any juror was coerced or pressured into agreeing with the jury's verdicts, Bey has at most shown that what occurred was an error with the jury polling process,[3] rather than a denial of his constitutional right to a unanimous 12-member jury.

II.

Having clarified the scope of the irregularity, we now turn to what relief, if any, Bey would be entitled to receive for an error in the jury polling. "[F]orfeiture refers to the failure to timely assert a right." *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 631 n.3 (Minn. 2017). "When a defendant fails to object at trial, the forfeiture doctrine generally precludes appellate relief." *State v. Lilienthal*, 889 N.W.2d 780, 784 (Minn. 2017).

[3] It is possible that the error in the record reflects a genuine trial error wherein one juror was not asked to endorse the jury's verdicts. It is also possible that all 12 jurors responded to polling at trial, and the missing response was omitted either by a recording error or an error during the preparation of the transcript. The State argues that it is not reasonable to assume that a juror would fail to speak up if overlooked and that the only reasonable inference is that the transcript reflects an error in recording or transcription. But we need not resolve this question. Whether the record reflects a genuine trial error in the conduct of the jury poll, or whether it was merely a recording or transcription error, our analysis remains the same. We therefore proceed by presuming, without deciding, that the record reflects an error in the conduct of the polling itself.

Bey made no objection suggesting that any jurors were missing or overlooked before the district court when the jury was polled. Bey nevertheless claims that the error is a structural error that automatically entitles him to relief. In the alternative, Bey claims that he is entitled to relief under the plain error doctrine. We consider each claim in turn.

A.

Structural error is a very limited class of error, which generally requires automatic reversal. *See State v. Dalbec*, 800 N.W.2d 624, 627 (Minn. 2011). This is because structural errors are "defects in the constitution of the trial mechanism" such that the entire course of the trial is affected. *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991). Structural errors defy an analysis of the harmfulness of the error. *Weaver v. Massachusetts*, 578 U.S. ___, ___, 137 S. Ct. 1899, 1907–08 (2017). This is because "the effects of the error are simply too hard to measure," "harm is irrelevant to the basis underlying the right," or "the error always results in fundamental unfairness." *Id.* at ___, 137 S. Ct. at 1908.

Bey asserts that claims of structural error are not subject to forfeiture, citing to our decision in *State v. Brown* in which we stated that "[s]tructural errors always invalidate a conviction whether or not a timely objection to the error was made." 732 N.W.2d 625, 630 (Minn. 2007). *Brown*, however, was resolved on other grounds—making this statement dicta. *See id.* at 629. We recently addressed whether a defendant was entitled to automatic reversal of his conviction because of an unobjected-to structural error—specifically, a claimed violation of the defendant's right to a public trial—in *Pulczinski v. State*, 972 N.W.2d 347 (Minn. 2022). In *Pulczinski* we held that, absent an objection during trial, we lack the discretion to grant relief for structural errors unless the error "seriously affected

the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 359. But reaching this inquiry requires us to accept the underlying assumption that Bey's argument makes—namely, that the polling error here was structural error. Because we conclude that no structural error occurred here, we need not determine whether Bey forfeited his claim of structural error.

Structural error occurs in circumstances in which the effect of the error cannot be assessed. *Dalbec*, 800 N.W.2d at 627. For example, in *State v. Dorsey*, we found structural error when the judge independently conducted factual research. 701 N.W.2d 238, 253 (Minn. 2005). Because defendants are entitled to a neutral decisionmaker, the judge's independent factual investigation compromised this singularly important safeguard. *Id.* In this case, however, it is possible to evaluate whether the alleged polling error affected the result because it was not the only safeguard assuring a constitutional jury verdict. The jury instructions, comments and instructions from the district court, the conduct of the jurors, and the lack of objections also served to guarantee the integrity of the trial.

Another way an error may be structural is that any harm to the final verdict resulting from the error is irrelevant; in other words, structural error cannot be excused as harmless error because the structural right that was violated exists to protect something other than the fairness of the final verdict. An example of a structural error in which harm is irrelevant is the denial of the right to self-representation. *Weaver*, 578 U.S. at ___, 137 S. Ct. at 1908. This is because the right to self-representation protects "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty," regardless of whether the exercise of the right is helpful for the defendant.

Id. A denial of the right to self-representation may not necessarily harm the defendant. But if a defendant were convicted after a denial of the right to self-representation, it would be structural error even if it could be proven that the defendant still would have been convicted absent the denial because the right exists to protect the "defendant's free choice independent of concern for the objective fairness of the proceeding." *State v. Richards*, 456 N.W.2d 260, 263 (Minn. 1990) (citation omitted) (internal quotation marks omitted). Jury polling, however, is an optional and nonexclusive procedural mechanism designed to protect a defendant from an erroneous guilty verdict. Because a defendant's right to poll the jury exists to safeguard the verdict, the effect of a violation of the right to poll the jury may be assessed if other evidence proves that the jury verdict was fair and proper.

Finally, it cannot be said that an error in jury polling always results in fundamental unfairness. Jury polling is optional and does not always occur. And more importantly, there are other procedures during a trial to ensure the right to a unanimous verdict. As a result, we conclude that, because Bey has failed to demonstrate that a structural error occurred, he is not entitled to relief on this ground.

B.

Bey also asserts that he is entitled to relief under the plain error doctrine. Under the plain error doctrine, an appellate court has a limited power to grant relief based on unobjected-to trial errors. Minn. R. Crim. P. 31.02; *State v. Beaulieu*, 859 N.W.2d 275, 279 (Minn. 2015). A plain error is (1) an error, (2) that is plain, and (3) affects the party's substantial rights. *State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013). An error is plain when it is clear or obvious. *State v. Reek*, 942 N.W.2d 148, 160 (Minn. 2020). An error is

clear when it contravenes case law or court rules. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). An error affects a party's substantial rights when there is a reasonable likelihood that the error influenced the verdict. *Id*. In other words, the issue is whether there is a reasonable possibility that a reasonable jury might have reached a different verdict but for the error. *Cf. State v. Gutierrez*, 667 N.W.2d 426, 435 (Minn. 2003) (holding that an improper jury instruction did not affect the defendant's substantial rights because the defendant could not establish that a proper instruction could have changed the outcome of the case). But even when these three prongs are established, a plain error does not justify granting a new trial unless "our failure to do so will cause the public to seriously question the fairness and integrity of our judicial system." *Pulczinski*, 972 N.W.2d at 359.

Again, it is undisputed that the record reflects an irregularity. When requested, "[e]ach juror must be asked individually whether the announced verdict or finding is that juror's verdict or finding." Minn. R. Crim. P. 26.03, subd. 20(5)(b). But an alleged error does not affect a defendant's substantial rights unless the defendant proves that "there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury's verdict." *Reed*, 737 N.W.2d at 583 (citation omitted) (internal quotation marks omitted).

Bey argues that the jury may have reached a different conclusion because the trial concerned a highly emotional event and the witness testimony about the gun was not entirely consistent. We disagree. Contrary to Bey's claim, the evidence of his guilt was strong: multiple witnesses testified that Bey entered the apartment without consent and then used a gun to forcibly remove the children from the apartment, and video recordings

corroborated this testimony. *See State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (stating that one factor in determining whether an error affected a defendant's substantial rights is "the strength of the evidence against the defendant"). Bey also does not present any evidence that any juror disagreed, had doubts, or was pressured into agreeing with the verdicts. *Cf. State v. Everson*, 749 N.W.2d 340, 349 (Minn. 2008) (holding that an alleged error in the jury process "without even any allegation of misconduct . . . much less any evidence of the same" was insufficient to demonstrate that the defendant's substantial rights were affected). The district court repeatedly instructed the jury that any verdict must be unanimous. The jurors were asked as a group whether they all agreed with the verdicts, and they responded affirmatively without any objection. Bey has not established that there is a reasonable likelihood that the jury would have reached a different result had the twelfth juror been polled. As a result, Bey is not entitled to relief under the plain error doctrine.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.